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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JADEN ALLEN, Plaintiff and Respondent, v. OMPRAKASH PANJWANI, Defendant and Appellant.	G056963 (Super. Ct. No. 30-2017-00904192) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Nathan R. Scott, Judge. Affirmed.

Brown, Bonn & Friedman, Kristina A. Hoban and Elizabeth C. Bonn for Defendant and Appellant.

Law Office of Gerald Philip Peters, Gerald P. Peters; Yadidi Law Firm and David Yadidi for Plaintiff and Respondent.

* * *

Defendant and appellant Omprakash Panjwani appeals from an order denying his motion to set aside a default judgment entered in favor of plaintiff and respondent Jaden Allen. Defendant claims the judgment was void on its face based on a defective proof of service, which he describes as the failure to serve him with the complaint or statement of damages. The record reflects defendant was served and the court correctly denied the motion. Thus, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In February 2017 plaintiff filed a personal injury action against defendant. On March 22, 2017, a registered process server personally served the summons and complaint and a statement of damages on defendant. Defendant did not file an answer within 30 days. On May 3 plaintiff filed a request to enter default, which was entered that day. In September plaintiff filed a request to enter a court judgment; this was served on defendant by mail. In October the court entered a judgment against defendant in the sum of $401,651.45.

In May 2018 defendant filed a motion to set aside the default and default judgment pursuant to Code of Civil Procedure section 473.5, subdivision (b)[1] (all further statutory references are to this section unless otherwise stated). The motion claimed defendant had not been served with the summons and complaint and he had no actual notice of the suit. Defendant and defendant's wife each filed a declaration stating defendant "was never served with the summons and complaint . . . . The documents were not left at [our] home and were not personally served on [defendant]." That was the extent of the facts offered to show lack of service.

Plaintiff filed an opposition, which included a declaration by the process server. It included a lengthy explanation of the circumstances of service, including a

[1] Defendant incorrectly states in his brief the motion was also brought pursuant to sections 473, subdivisions (b) and (d) and 425. Those statutes are not included in the motion.

description of the documents served, the address at which they were served, and a physical description of defendant. The process server explained that when defendant's wife answered the door, the process server asked to speak to defendant, calling him by name. Defendant's wife explained defendant was her husband and called him to the door. Before the process server served defendant, defendant admitted his identity but did not want to accept service. He began explaining the details of the accident. The process server gave him the documents. The process server filed a proof of service of the summons and complaint and statement of damages.

In his reply, defendant argued, for the first time, that the statement of damages had not be served. He further contended, again for the first time, that if the court found he had been served it could set aside the default under section 473.5.

The court denied the motion.[2] First, it ruled section 473.5 was not a basis for defendant's claim. It provides relief when proper service does not give actual notice. Here, defendant was claiming improper service. The correct statute is section 473, subdivision (d), which allows for relief from a void judgment, such as one entered where there has not been proper service of a summons and complaint.

Second, the court ruled defendant had not shown a failure of proper service. It relied on the process server's attestation of personal service and his declaration detailing the actual service. When a proof of service is filed by a process server, proper service is presumed. (Evid. Code, § 647.)

DISCUSSION

While making some confusing and sometimes contradictory contentions about why the judgment should be set aside, defendant posits his basic premise that the judgment is void for one or more reasons. None of his arguments persuades.

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[2] Contrary to defendant's claim, the court did not deny the motion on the ground it was untimely filed.

Defendant claims the default was entered improperly because he had not been previously served with a statement of damages required under section 425.11, subdivision (b).[3] But the record plainly reveals the statement of damages was personally served at the same time as the summons and complaint.

Defendant complains plaintiff did not file a statement of damages until after default was entered and it had no proof of service. But he cites no authority as to when a statement of damages must be filed. It appears the only requirement is that the trial court have a copy before it enters a default judgment. Section 585, subdivision (b) allows a court to enter a default judgment in an amount not to exceed either the amount prayed for in the complaint or set out in the statement of damages. This was satisfied.

Notably, on appeal, defendant does not argue he was not served with the summons and complaint, the basis of his claim in his motion to set aside in the trial court.

Defendant also claims plaintiff did not comply with section 587, which requires an affidavit showing a request to enter default has been mailed to the defendant. Defendant is wrong. The request to enter default contained in the record states a copy was mailed to defendant at his admitted address. In addition, this was not the basis for the motion in the trial court but was raised only in defendant's reply to the opposition to his motion.

In his reply brief, defendant points to the declarations he and his wife filed where they stated they were not served, arguing allowing the default judgment to stand would be "draconian" and violate due process. But as the trial court noted, under Evidence Code section 647 there is a presumption of proper service where a registered process service files a proof of service, as was done here.

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[3] Section 425.11, subdivision (c) states that in a personal injury action if a defendant has not requested a statement of damages as allowed under subdivision (b), "the plaintiff shall serve the statement on the defendant before a default may be taken."

Moreover, the court gave credence to the process server's declaration in opposition to the motion. Further, evidence in the declarations of defendant and his wife was minimal. The declarations stated only that they were not served and documents were not left at their residence. They did not dispute the address on the proof of service or claim they had not been home at the time of the alleged service or give any other explanation for their claim. The court was well within its discretion to believe the process server and disbelieve defendant and his wife. We do not disturb a credibility determination. (*Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1229.)

At oral argument defendant relied heavily on *Fasuyi v. Permatex, Inc*. (2008) 167 Cal.App.4th 681 for the principle that only """very slight evidence""" is needed to set aside a default. (*Id*. at p. 695.) He claimed the bare bones declarations he and his wife filed suffice to meet this standard. But defendant failed to provide the entire statement and context of this quoted snippet. In *Fasuyi*, the court noted that when the defaulting party """promptly""" moves to set aside the default under section 473 (not the statute on which defendant here based his motion), """very slight evidence will be required to justify a court setting aside the default.""" (*Ibid*.) Here defendant did not file his motion promptly.

Finally, in the reply brief, defendant argues the court could set aside the default under section 473.5 if "[p]laintiff is right that service was effected but for some reason [d]efendant was unaware of it." This argument has no merit for two reasons.

First, it was not raised in the opening brief, depriving plaintiff of the opportunity to respond. We need not consider arguments made for the first time in the reply brief. (*Mansur v. Ford Motor Co*. (2011) 197 Cal.App.4th 1365, 1387-1388.)

Second, even if we were to consider this claim on the merits, to set aside a default judgment under section 473.5, a defendant must show his lack of actual notice "was not caused by his . . . avoidance of service or inexcusable neglect." (§ 473.5, subd. (c).) Defendant has not proven either element. He makes no mention of inexcusable

neglect. As to avoidance of service, he relies on the process server's declaration that defendant was served at home, claiming this shows he did not avoid service. This is in direct contradiction to his claim he was not served. Further, contrary to his argument, it is not plaintiff's burden to prove defendant avoided service; it is defendant's burden to prove he did not.

DISPOSITION

The judgment is affirmed. Plaintiff is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.